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ABSTRACT

This article examines the education of students in U.S. schools who have have limited skills in English. Ensuring that these children are able to participate in and benefit from educational programs and achieve high academic standards is a task of monumental importance for public schools. One component essential to this effort is understanding the legal requirements applicable to these children. Among the federal laws affecting the education of students with limited English proficiency are the equal protection clause of the Fourteenth Amendment, Title VI of the Civil Rights ACT of 1964, the Equal Educational Opportunities Act, and the Bilingual Education Act. A list of Office of Civil Rights compliance recommendations is included in the article, and information on state laws and U.S. Supreme court decisions regarding the rights of speakers of languages or than English is provided. (VWL)

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Inquiry & ANALYSIS

A MEMBERSHIP SERVICE OF THE NSBA COUNCIL OF SCHOOL ATTORNEYS

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EDUCATING STUDENTS WITH LIMITED ENGLISH SKILLS

As the number of students who come to school with limited English skills continues to grow, ensuring that these children are able to participate in and benefit from educational programs and achieve high academic standards is a task of monumental importance for public schools. One component essential to this effort is understanding the legal requirements applicable to these children (sometimes referred to as Limited English Proficient (LEP) students or English Language Learners). Among the federal laws affecting the education of students with limited English proficiency are the equal protection clause of the Fourteenth Amendment, Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000d, the Equal Educational Opportunities Act, 20 U.S.C. § 1703(f), and the Bilingual Education Act, 20 U.S.C. § 7401 *et seq.*.

The Office for Civil Rights (OCR) of the U.S. Department of Education has issued nondiscrimination regulations under Title VI that appear in 34 C.F.R. Part 100. It has also issued several compliance memoranda that explain its position on the responsibilities of schools to provide services to "national origin minority students who are limited English proficient." These documents are available on the Internet at *http://www.ed.gov/offices/OCR/laumemos.html.*

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OCR TITLE VI COMPLIANCE RECOMMENDATIONS

OCR does not prescribe a specific type of program that districts must use to serve LEP students. But it recommends that districts follow these procedures to ensure English Language Learners are served effectively:

- identify students who need assistance and determine the types of assistance needed;
- ensure that LEP students are not misidentified as students with disabilities because of their English language limitations;
- develop a program, which in the view of experts in the field, has a reasonable chance for success;
- ensure that all LEP students receive English language development services;
- ensure that necessary staff, curricular materials, and facilities are in place and used properly;
- develop appropriate evaluation standards, including program exit criteria, for measuring the progress of students;
- provide national-origin minority parents with adequate notification to make informed decisions about their children's participation in the district's programs and services; and
- assess the success of the program and modify it where needed.

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STATE LAWS

State law may also affect how schools are allowed to deliver these services. For example, in 1998 California voters approved Proposition 227 which limits the types of programs that schools may provide for English language learners. It requires that all such children be placed in sheltered or structured English immersion classrooms where "nearly all classroom instruction is in English," followed by transition to English language classrooms where the instruction is "overwhelmingly" in English.

. . . school districts must comply with state law in a manner consistent with federal legal requirements.

This year voters in Arizona followed suit, giving their approval to Proposition 203, requiring that students who are English language learners be placed in English immersion classrooms, virtually eliminating bilingual education programs and English acquisition approaches using pull out services, such as English as a Second Language. The measure makes school officials and administrators personally liable for repeated violations of these requirements.

Like its California counterpart, the law envisions that students will rapidly move from immersion classes to regular classroom instruction. The ostensible goal of both measures is to assist students in becoming functionally literate in English. The Arizona Department of Education is targeting the 2001-02 school year for implementation of the law.

After voters in California passed the English immersion requirement in 1998, OCR issued a memorandum making clear that the law does not relieve school districts of any of their obligations under federal civil rights laws, saying that California school districts must comply with state law in a manner consistent with federal legal requirements. The agency offered its assistance to those school districts operating under an OCR-approved plan which might need modification in light of Proposition 227. The position of any new administration on the potential conflicts between Arizona's law and federal requirements is not certain.

In a related development, voters in Utah approved a measure supposedly aimed at encouraging all its residents with limited English language proficiency to learn English as quickly as possible. Initiative A makes English the official language of the state and requires that all government documents and actions be in English. The law does provide exceptions that allow the use of languages other than English in certain circumstances, such as when required by the federal or Utah constitutions, federal law or regulation, or rules made by the state board of education. In passing this measure, Utah joins 25 other states that have adopted English as their official language. Several of these states, including Arizona, Alaska and Alabama, have been embroiled in law suits contesting the validity of these laws.

U.S. SUPREME COURT

The lawsuit in Alabama, *Sandoval v. Hagan*, 197 F.3d 484 (11th Cir. 1999), will be decided by the U.S. Supreme Court this term. On September 26, 2000 the Supreme Court accepted the case for review under the name, *Alexander v. Sandoval* (No. 99-1908). The Eleventh Circuit ruled that the Alabama Department of Public Safety's official policy of administering its driver's license examination only in English violates the Title VI prohibition of discrimination on the basis of national origin. The state agency, which receives more than a million dollars in federal funds annually, had adopted the policy after an English-only amendment to the Alabama Constitution was ratified in 1990. Both the U.S.

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NINTH CIRCUIT SAYS TEACHER LICENSING EXAM WITH HIGH MINORITY FAILURE RATES IS NOT DISCRIMINATORY

A California teacher licensing exam that in effect stopped many Black, Hispanic and Asian candidates from entering the profession was not discriminatory by virtue of the high failure rate of minorities, the Ninth U.S. Circuit Court of Appeals ruled on October 28.

In a suit brought by the Association of Mexican-American Educators, the California Association for Asian-Pacific Bilingual Education and the Oakland Alliance of Black Educators, the groups asserted that the California Basic Educational Skills Test (CBEST) was designed in a way that caused a disproportionate number of racial minorities to fail. The plaintiffs alleged that the exam-based gateway to teaching amounted to discrimination under Title VI and Title VII of the Civil Rights Act of 1964 (42 U.S.C. §§ 2000d, 2000e) because minorities aspiring to be teachers failed more frequently than Caucasian counterparts.

Reviewing the evidence, the Ninth Circuit Court concluded that while indeed the exam did have a disproportionate impact, its appropriateness was validated through three separate studies, including review by panels that included members of minority groups. The opinion also stated that Title VI does not apply to the California Commission on Teacher Credentialing (CTC), which administers the exam, because the agency is not a recipient of federal funds, as required by the statute. That finding reversed the district court, which concluded that under the California State Constitution, there existed an "entire, unified school system" that included regulatory bodies such as the CTC. Essentially, the Ninth Circuit held, the California Constitution used the term in a way different and more expansive than Congress did in its definition of "school system" under Title VI – and the more applicable meaning was the one given by Congress.

The court rejected a Title VII analysis because the statute applies to relationships between employers and employees. The Ninth Circuit held that Title VII is inapposite because the local school district—and not the state—is the potential employer. Even though school districts are instrumentalities of the state, the court acknowledged, it analogized to the corporate parent/subsidiary relationship and noted that it is well established that a parent company will not usually be considered the "employer" under a Title VII claim.

The case is *Association of Mexican American Educators v. State of California*, 231 F.3d 572 (9th Cir. 2000).

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Department of Justice and U.S. Department of Transportation have adopted regulations prohibiting grant recipients from employing criteria or methods of administration that have the effect of discriminating based on national origin. The appellate court found that there was an implied private cause of action to enforce disparate impact regulations promulgated by federal agencies under section 602 of the law. The Supreme Court will consider whether Congress intended to create a private cause of action to enforce disparate effect regulations against a state agency that receives federal funds. Alabama is contending that private litigants should not be able to bypass the federal agency review and enforcement process established by Congress. The Supreme Court will hear arguments on January 16, 2001.

OTHER SUPREME COURT CASES ON TITLE VI

Lau v. Nichols, 414 U.S. 563 (1974). Court unanimously held that school system violated Title VI by failing to provide English language instruction or other adequate instructional methods for students of Chinese ancestry who did not speak English. The Court so ruled based on regulations promulgated under Title VI by the U.S. Department of Health, Education and Welfare that barred recipients of federal funds from using "criteria or methods of administration which have the effect of subjecting individuals to discrimination." The Court said obviously the Chinese-speaking minority received fewer benefits because these students were foreclosed from receiving any meaningful education.

Regents of University of California v. Bakke, 438 U.S. 265 (1978). Achieving racial diversity is sufficient reason for considering race in the admissions process of a public university. However, applicants may not be denied admission based solely on race. Racial classifications and preferences are subject to strict scrutiny. Guarantees of the Fourteenth Amendment and Title VI are coextensive.

Guardians Assoc. v. Civil Service Commission of City of New York, 463 U.S. 582 (1983). Black and Hispanic employees challenging employer's enforcement of a "last-hired, first-fired" policy must prove intentional discrimination to recover compensatory damages under Title VI. Seven members of the Court agreed that proof of intentional discrimination is necessary to prove a violation of the statute itself, but only five adhered to the view that disparate impact regulations promulgated by federal agencies under the Act are valid.